ORIGINAL

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**



| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Rules and Policies on Foreign Participation | ) | |
| in the U.S. Telecommunications Market | ) | File No. IB 97-142 |

---

# REPLY COMMENTS OF AT&T CORP.

---

Mark C. Rosenblum
Lawrence J. Lafaro
James J. R. Talbot

295 N. Maple Avenue
Room 3252H3
Basking Ridge, NJ 07920
(908) 221-8023

Dated: August 12, 1997

Table of Contents

## SUMMARY

The World Trade Organization ("WTO") Agreement on Basic Telecommunications promises to bring long-term benefits to consumers and carriers by removing many existing legal barriers and establishing global rules of competition. Beginning on January 1, 1998, many previously closed foreign markets will become more open, providing opportunities for new domestic and foreign competitors, and offering consumers lower prices and a wider range of service options . The WTO agreement is thus a historic achievement, largely made possible by the leadership role played by the U.S. interagency team, led by the Office of the U.S. Trade Representative ("USTR"), and including the Commission, and the Departments of Commerce and State, in negotiating the agreement over a two-year period.

In response to the WTO agreement, the Commission proposes that carriers from WTO Member countries should no longer be subject to the effective competitive opportunities ("ECO") test for Section 214 authorizations, Section 310(b)(4) applications and Submarine Cable Act applications. Section 214 authorizations for such carriers would be presumed to be in the public interest, unless a showing was made that a grant would pose "a very high risk to competition" that safeguards could not address. Submarine Cable Act applications would be routinely granted unless a similar showing were made, and Section 310(b)(4) applications would be subject to a strong presumption against denial. The equivalency test for the provision of switched services over international private lines would no longer be applied to these countries, and flexible arrangements would be presumed lawful.

While the WTO agreement offers the prospect of a more competitive global telecommunications market in the future, in which AT&T looks forward to participating, the existing landscape will not change overnight, even in those countries that have agreed to open their markets. At this early stage in the implementation of the WTO agreement, the Commission's proposals are based on mere commitments to open markets, rather than on evidence that they have been fully carried out. The U.S. experience -- in both long-distance and local services -- shows the introduction of competition to be a difficult and lengthy process, and foreign incumbent carriers are unlikely to be willing to admit new competitors any more readily than incumbents have been willing to do in the U.S. No commenter shows these concerns expressed by AT&T and other U.S. international carriers to be misplaced.

Just as the timely implementation of WTO commitments cannot be taken for granted, it cannot be assumed that the market power of incumbent carriers will quickly disappear. The experience of the UK, where BT retains a 91 percent share of local revenues and 80 percent of long-distance revenues fifteen years after competition was first introduced, and six years after the abolition of the former duopoly, shows that incumbent market power will remain in place for many years, however quickly WTO commitments are implemented.

Moreover, many commenters fail to acknowledge that those countries committing to open their international services markets fully on January 1, 1998 comprise less than one-fifth of the 130-strong membership of the WTO. The market-opening commitments of a significant number of WTO Member countries will not become effective

until after 1998, while many WTO Members did not participate in the negotiations and made no commitments.

There has been no showing in this proceeding, therefore, that the WTO agreement effects sufficient immediate change in the foreign market conditions that led the Commission to establish its existing market entry rules in 1995 to allow the removal of those rules at this time without exposing the U.S. market to potential competitive harm. Such harm may occur, in particular, from the leveraging of above-cost settlement rates through price-squeezes and one-way by-pass. Consequently, it would be premature to remove existing entry rules unless an effective alternative safeguard is adopted by requiring cost-based settlement rates (i.e., at the low-end of the proposed benchmark ranges).

Without this additional critical safeguard, the Commission should not rely upon "competitive market forces rather than [the] ECO test" (NPRM ¶ 33) to prevent competitive harm from the leveraging of foreign market power. The Commission's new requirement for high-end benchmark settlement rates for market entry on affiliate routes is an important step that AT&T strongly supports, but will still allow above-cost settlement rates to be used to price squeeze U.S. carriers and to by-pass settlement rates on U.S.-inbound calls.

Nor is there any justification to the claims by some commenters that such harm could not occur, which ignore the incentives of foreign-affiliated carriers to increase U.S. settlement outpayments in this way. The Affidavit of Dr. William Lehr submitted with AT&T's Comments demonstrates that such harm is likely and may only be prevented

by the continuation of present market entry rules or by a requirement for cost-based settlement rates.

Accordingly, the Commission properly proposes that license applications posing risks to competition that could not be addressed by available safeguards should be denied. Unless low-end rather than high-end benchmark settlement rates are required on affiliate routes for the provision of all types of switched services, including switched resale, the denial of licenses will continue to be necessary where pre-entry analysis shows competitive conditions in the foreign country to be insufficient to prevent harm to the U.S. market.

USTR affirms that the WTO agreement does not affect the Commission's ability to protect the U.S. market against competitive harm and that the agreement allows continued pre-entry analysis of the potential abuse of foreign market power. USTR also emphasizes that the Commission may continue to take account of foreign market conditions that give an applicant the ability to engage in anticompetitive conduct.

USTR's comments demonstrate the falsity of the predictable assertions by foreign commenters that the WTO agreement precludes any such inquiry, or any limitation on market entry, no matter how high the risk of anticompetitive conduct. These comments by USTR, the agency responsible for the interpretation of U.S. international trade obligations, resolve any issue in this proceeding concerning the consistency of the Commission's proposals with the General Agreement on Trade in Services ("GATS"). Further, as USTR requests, the Commission should continue to defer to USTR as the Executive Branch agency with the statutory responsibility for such matters.

USTR further confirms that the existence in the foreign market of a transparent regulatory framework, regulations to protect competition and adequate interconnection arrangements for international services all continue to be legitimate areas of Commission inquiry. These foreign market conditions identified by USTR include three key requirements of the ECO test established by the Commission to prevent the leveraging of foreign market power.

As AT&T has described, the existence of the competitive conditions required by the ECO test, modified to focus on the ability of the applicant to abuse its market power rather than on the existence of competitive opportunities for U.S. carriers, should remain part of the Commission's pre-entry analysis. Such an inquiry is not precluded by the WTO agreement and should continue unless the provision of switched services on affiliated routes is conditioned on the availability of cost-based settlement rates to all U.S. carriers.

There is also no showing by any commenter that the Commission's proposed presumption in favor of entry and requirement for a threshold showing of "a very high risk to competition" to warrant denial of a Section 214 application are required by the WTO agreement. A neutral burden of proof and the existing "substantial risk" standard of harm, as AT&T has demonstrated, are equally compatible with the GATS and should be retained to ensure that the U.S. market does not suffer unnecessary competitive harm.

Stronger post-entry safeguards are also necessary -- notwithstanding any future achievement of cost-based settlement rates -- to prevent other types of anticompetitive conduct, particularly cross-subsidization and actions to raise rivals' costs.

In particular, the supplemental dominant carrier rules proposed by the Commission should be expanded to require the filing of detailed information concerning affiliate transactions, the structural separation of the U.S. affiliate and expedited complaint procedures. Claims by foreign commenters that such rules would constitute an improper market access restriction are unfounded, as domestic regulation to prevent anticompetitive conduct is clearly permissible under GATS.

As the NPRM proposes, these rules should apply to carriers with market power in countries where multiple international facilities-based competitors have not been authorized. To limit potential discrimination by carriers with the ability and incentive to engage in such misbehavior, the supplemental rules should also apply to carriers with market power in countries where the WTO Reference Paper has not been implemented or that fail to allow non-nationals to control international carriers.

Finally, the Commission should not adopt its proposed presumption in favor of allowing flexible arrangements with WTO Member countries. Instead, it should use a neutral presumption, with the proponent of the arrangement carrying the burden of production of evidence that the relevant country is sufficiently competitive to preclude discrimination. No commenter shows that a general presumption in favor of such arrangements is justified by market conditions or required by the WTO agreement.

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Rules and Policies on Foreign Participation | ) | |
| in the U.S. Telecommunications Market | ) | File No. IB 97-142 |

## REPLY COMMENTS OF AT&T CORP.

AT&T Corp. ("AT&T") hereby submits its Reply Comments in response to the comments filed by other parties[1] concerning the Commission's proposed revision of its rules governing foreign carrier entry to, and participation in, the U.S. telecommunications market.[2]

## I. THE WTO AGREEMENT WILL NOT BRING SUFFICIENT IMMEDIATE CHANGE IN COMPETITIVE CONDITIONS TO JUSTIFY THE REMOVAL OF EXISTING SAFEGUARDS.

The Commission proposes (¶ 32) to remove existing entry requirements from the U.S. international services market and presumptively to authorize all Section 214 applications from WTO Member countries unless it is shown that such action would pose "a very high risk to competition" that could not be addressed by post-entry safeguards.

---

1 The commenters are listed at Attachment 1.

2 *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, IB Docket No. 97-142, Order and Notice of Proposed Rulemaking, (released June 4, 1997), FCC 97-195 ("NPRM").

Cable Landing License Act applications would be "routinely grant[ed]" unless a sufficiently "high risk to competition" was shown, and Section 310 (b)(4) common carrier applications would be subject to "a strong presumption that denial . . . would not serve the public interest." NPRM ¶¶ 63, 73.[3]

The Commission's proposal to remove its recently-introduced effective competitive opportunities ("ECO") test from WTO Member countries is based on no newly-discovered infirmity in that analysis, but is founded instead on the Commission's belief that WTO commitments and the proposed settlement rate benchmarks will allow reliance "on competitive market forces rather than our ECO test as a means of achieving the maximum benefits for U.S. consumers." *Id*, ¶ 33. Therefore, a key assumption underlying the NPRM is that the increased global competition resulting from the WTO agreement will greatly reduce foreign market power and make existing entry procedures unnecessary. *See* NPRM ¶ 31. As demonstrated by AT&T (pp. 1-12), without rebuttal by any other commenter, that assumption is incorrect.

There is no evidence that the WTO agreement will immediately create open, competitive markets in all member countries or remove the market power of incumbent carriers. Nor will WTO commitments necessarily be implemented on a timely basis. As MCI observes (p. 2), "it will take time for vigorous competition to develop where it does not exist, even in countries that have made far-reaching liberalization

---

[3] Similarly, the equivalency test would no longer govern applications to provide switched services over international private lines to WTO Member countries, and flexible accounting rate agreements with such countries would be presumptively lawful. *Id.* at ¶ 50, 150.

commitments." Moreover, less than one fifth of WTO Member countries have committed to open their markets fully on January 1, 1998, and almost half have made no commitments at all.

In sum, no showing has been made in this proceeding that the WTO agreement provides a sufficient change in circumstances to justify the removal of the Commission's existing entry procedures. AT&T shares the "deep concern" expressed by WorldCom (p. 2) that "the Commission has underestimated the continuing ability and incentive of foreign carriers with market power, and their affiliates, to leverage control over bottleneck facilities to the detriment of U.S. competition."

**1. Reliance Upon Commitments Rather Than Upon Evidence of Competition Would Expose the U.S. Market to Competitive Harm.**

The Commission's 1995 *Foreign Carrier Entry Order* establishing the ECO test was based on its finding that allowing unlimited access to the U.S. market by foreign carriers with market power in foreign markets would not promote effective competition.[4] *See* AT&T at 3-5. Underlying this finding were the Commission's conclusions that dominant foreign carriers had the ability and incentive to abuse their market power on affiliated U.S. international routes, that such abuse was contrary to the U.S. public interest, and that post-entry safeguards were insufficient to prevent this harm to competition.[5] The NPRM repudiates none of these conclusions and endorses the continued use of the ECO analysis for non-WTO countries -- thus affirming the continuing

---

[4] *Market Entry and Regulation of Foreign-affiliated Entities*, 11 FCC Rcd. 3875 (1995) (Report and Order) ("*Foreign Carrier Entry Order*").

necessity of this entry standard to prevent the leveraging of foreign market power. Nonetheless, the NPRM (¶¶ 29, 32) proposes to remove the ECO analysis from WTO countries because the commitments made in the WTO negotiations "substantially achieve" its goals.

The WTO agreement undoubtedly provides strong grounds for optimism concerning the future of global competition in telecommunications. But as noted by AT&T (pp. 1-12), MCI (pp. 2-3) and WorldCom (pp. 2-4), the Commission's declaration of victory is decidedly premature. At this early stage, with the WTO agreement not even effective until January 1, 1998, the Commission would remove existing entry standards in reliance upon mere commitments to introduce liberalization, rather than upon evidence that they have been fully carried out.

As recognized by Telecom Finland (p. 7), "[a] hollow or unfulfilled commitment is no better than no commitment at all."[6] WorldCom (p. 4) underscores the lesson taught by the U.S. experience with the Telecommunications Act of 1996 -- that "actual implementation of sweeping procompetitive policies can be as difficult and time-consuming as establishing the initial policies."

Competition in other countries, even where full WTO open market commitments have been made and where liberalization plans are most advanced, is no less

(footnote continued from previous page)

5 *Id.* at 3880, 3885, 3959.

6 *See also,* GTE at 2 (acknowledging that the WTO reference paper will only reduce the risk of anticompetitive behavior if "[i]mplemented and enforced conscientiously"); FaciliCom at 11 (WTO agreement will bring dramatic changes "[a]ssuming that WTO members honor their commitments").

subject to appeal and delay than in the United States. DT asserts (p. 21) that it is "certain" that Germany will be "fully open" and in compliance with its WTO obligations, but DT itself is jeopardizing the market-opening date by stoutly resisting unbundled interconnection agreements with its new domestic competitors.[7] Similarly, FT (p. 7) assures the Commission of France's and the European Union's "strong commitment[s]" to liberalization, but has taken legal action against the new interconnection rules in France.[8] KDD (p. 2) urges the Commission to share "Japan's vision of open markets and competitive entry," although key interconnection requirements will not be in place in Japan until 1999 at the earliest.[9]

Few, if any, of the WTO Member countries that made full market-opening commitments in the negotiations are yet in compliance with these commitments, although the market-opening date is less than six months away. Indeed, while no fewer than 16

---

[7] *See* "Telekom To Sue Post Minister," *Handelsblatt*, Jul. 17, 1997 at 11 (reporting that DT is to take legal action against the German Ministry of Posts and Telecommunications that may delay market-opening in Germany beyond the January 1, 1998 implementation date); "Bonn Delays Ruling on D. Telekom," *Reuter*, Jul. 15, 1997 (describing unbundled interconnection as a crucial cost issue for new companies and reporting the designated president of Germany's new regulatory body as stating that he did not believe that DT was prepared to reach any agreement on interconnection with its competitors).

[8] *See* "France Telecom Contests Art's Decree," *La Tribune*, Jul. 1, 1997 at 12 (reporting that FT has lodged an appeal to the French Council of State against some of the measures contained in the interconnection decree negotiated between FT and the French regulator).

[9] *See* "Japan Gets Set For Near-Complete Deregulation of Telecommunications," *Financial Times Telecom Markets*, May 22, 1997 at 1, 2 (reporting that the Japanese regulator, MPT, "has set up three study groups to work on regulatory guidelines to cover areas such as number portability and the standard interconnection contract. But these study groups are not required to report back until the start of 1999.")

foreign administrations, foreign carriers or their U.S. affiliates have filed comments in this proceeding, many of them asserting that the Commission is not doing enough to open the U.S. market,[10] only six make reference to their own market opening plans,[11] and not one describes how and when its country will comply with its own WTO market access and key Reference Paper commitments.

As the NPRM acknowledges (¶ 29), WTO commitments can promote competition only "when fulfilled."[12] To ensure that the U.S. market does not suffer competitive harm if these commitments are not fulfilled, a pre-entry evaluation will remain necessary, just as pre-entry approval is required for Bell Operating Companies that wish to offer domestic long-distance services from their dominant market.[13] *See* AT&T at 6.

---

[10] *See, e.g.,* C&W at 1-2, 5; NTT at 2; Telefonica at 3-4, 17. GTE, the owner of Codetel, the incumbent carrier in the Dominican Republic and the owner of a 26 percent interest in CANTV, the Venezuelan incumbent carrier, takes a similar position to other foreign-affiliated carriers.

[11] *See* DT at 2, 6; EU at ¶ 7; FT at 7-8; KDD at i, 1-2; Telecom Finland at 7-8; Telmex at 2..

[12] WTO dispute resolution procedures offer no immediate remedy for competitive harm to U.S. consumers and carriers. There is no private right of action in U.S. courts under these procedures and no right to obtain specific performance of WTO commitments. To obtain relief, the U.S. Government must bring an enforcement action in the WTO, where no remedy (i.e., implementation by the foreign government, retaliation or compensation) is available before a final decision is adopted, which may require up to 15 months if the matter is taken to the WTO Appellate Body. Even then, if the foreign government decides to implement changes in its laws or regulations after an adverse decision, it is allowed up to 15 months to do so, during which time there is no retaliation or right to compensation. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Arts. 4, 6, 20, 21, House Document 103-316, Vol. 1, 103$^{d}$ Cong., 2d Sess. (Sept. 27, 1994), 1654.

[13] Market entry by foreign carriers with above-cost settlement rates would lead to competitive distortion, as discussed in Section III, and premature market entry by the Bell Operating Companies before they face effective competition in their local

(footnote continued on following page)

## 2. Many Countries Will Not be Sufficiently Open in the Near Future to Limit Anticompetitive Conduct by Carriers with Market Power.

The Commission's proposed reliance upon WTO commitments rather than existing entry standards to prevent the abuse of foreign market power also overlooks the delayed or partial nature of the market-opening commitments made by many WTO Member countries. Many of the parties submitting comments also fail to take account of these deficiencies.[14] Thus, contrary to the statement by USTA (p. 2), all 69 WTO member countries participating in the recent negotiations will not allow competition by domestic and foreign suppliers in "local, long distance and international services, by wire and radio, on a facilities basis or through resale." As emphasized by AT&T (pp. 8-12), MCI (pp. 2-3) and WorldCom (p. 7), while some WTO Member countries have committed open their markets fully on January 1, 1998, other countries' commitments will not become effective until much later, and others have made only partial market-opening commitments.

---

(footnote continued from previous page)

exchange areas would have similar consequences. *See, e.g.*, Letter dated December 13, 1996, concerning Competitive Impact of Bell Operating Companies' Entry Into Long Distance, to Don Russell, Esq., Chief, Telecommunications Task Force, Antitrust Division, U.S. Department of Justice, from David W. Carpenter, Esq., Counsel for AT&T, at 15-23. Contrary to the claims by Bell South (pp. 1-7), SBC (p. 7) and USTA (p. 4), the Commission's proposed presumption in favor of entry by carriers from WTO Member countries would not justify similar treatment of BOC entry into in-region domestic long-distance services, which is governed by the specific requirements of Section 271 of the Telecommunications Act of 1996. In any event, as AT&T has described (pp. 18, 50-52), carriers from WTO Member countries should also be subject to pre-entry analysis of the conditions of competition in the markets in which they have market power and to similar post-entry safeguards as the BOCs.

[14] *See, e.g.*, Facilicom at 4; Frontier at 1, 3; USTA at 3; Telmex at 4; US West at 4; Viatel at 3.

Further, almost half the 130 WTO Member countries have made no market-opening commitments at all.

The Commission has previously established -- and reaffirms in the NPRM by proposing to retain the ECO test for non-WTO countries -- that the criteria of the ECO test properly define the level of openness that must exist in a foreign market to prevent the leveraging of foreign market power. *See* AT&T at 7-9. Yet, only 20 countries, accounting for only a third of U.S.-billed IMTS revenues, would meet these criteria on January 1, 1998 on the basis of their WTO commitments -- assuming they are implemented in full -- and only 25 countries would do so by the year 2000. *See* AT&T at 7-9 & Attachment 1. No commenter puts forward any evidence challenging this assessment.

This limited prospective change in competitive circumstances provides no basis for the relaxation of existing entry procedures. As WorldCom properly concludes (p. 7), because of the asymmetric nature of WTO commitments, the adoption of the new entry procedures proposed by the Commission would "significantly disadvantage" U.S. carriers.

Nor does any commenter show that the U.S. market would be adequately protected against competitive harm under the Commission's proposed distinction between the WTO Member countries that have not committed to open their markets, which would be admitted to the U.S. market under relaxed procedures, and non-WTO Member countries, which would remain subject to the ECO test. *See* AT&T at 11. The NPRM (¶ 35) acknowledges that the WTO agreement would be "less effective" in preventing anticompetitive harm if carriers from these non-committing WTO countries entered the

U.S. market. And the Commission's proposal to relax entry procedures for these countries is based in part on its expectation that they will liberalize in the future -- a conclusion that is highly speculative in view of these countries' potential ability to profit from their "free-rider" status. *Id.*

### 3. There is No Basis for the Commission's Proposed Changes in Existing Procedures.

This record provides no support for the removal of existing entry procedures for applications under Section 214, the Cable Landing License Act and Section 310(b)(4) to provide basic international services on affiliate routes. The WTO agreement will not open a sufficient number of countries to competition in the near future or sufficiently lessen the market power of incumbent carriers to allow reliance on "competitive market forces rather than the ECO test" to limit anticompetitive conduct. NPRM ¶ 33. But even if the Commission's assessment of the effects of the WTO agreement was correct, there would still be no basis for changing the existing entry standard.

At bottom, the Commission's reasoning for adopting a new standard is based on a non-sequitur. It is illogical to abandon the detailed pre-entry inquiry required by the ECO test merely because more foreign carriers are likely to satisfy its requirements in the future. The Commission continues to state that one of its goals "is to prevent anticompetitive conduct in the provision of international services or facilities." NPRM ¶ 26. Indeed, nothing has happened to change the Commission's obligation to assess the competitive effects of a service offering involving a U.S. carrier and an affiliate with market power in a foreign market. It may be that in 1998 more of these arrangements will

pass the ECO test than would have passed two years ago, but the reasons for carefully analyzing whether they are in the public interest remain.

**4. Foreign Investments in Radio Licenses Should be Subject to the Same Restrictions as Domestic Companies.**

Similar considerations do not apply to the waiver of Section 310 foreign ownership restrictions where there would be no provision of basic international services on affiliate routes and thus could be no competitive harm from the leveraging of foreign market power. Accordingly, AT&T supports the Commission's proposal to abandon the ECO test for investors from WTO Member countries as a necessary part of its public interest analysis for the granting of a waiver under the statute in such circumstances.

At the same time, the removal of restrictions on the grounds of foreign investment alone should not be applied in a manner which defeats other legitimate grounds for Commission investment limitations. A case in point involves the rules surrounding the auction of C and F block licenses for the provision of Personal Communications Services. In designing the auction rules for these blocks, the Commission sought to create more favorable terms for smaller U.S. companies --specifically, by allowing them to pay for their licenses over a longer time period and thereby to realize significant financial advantages. Now that the Commission seeks to allow up to 100 percent ownership of such licenses by foreign-based investors, it should not do so in a manner that would dispense with the restrictions previously prescribed for those license-holders relating to the size of the controlling companies and the transferability of these licenses.

It was certainly not the intent of the Commission or the Congress in developing the policies for this auction to provide the means for major foreign companies

to take controlling interests in what were originally intended to be smaller U.S.-based ventures on terms more favorable than those available to their U.S. carrier competitors. The Commission should ensure that foreign carriers seeking substantial ownership interests in the C and F blocks are bound by the same eligibility restrictions as domestic companies.[15]

## II. THE WTO AGREEMENT DOES NOT REQUIRE THE REMOVAL OF EXISTING SAFEGUARDS.

As AT&T has described (pp. 12-24), the Commission's proposed changes in entry and flexibility rules for U.S. international services go beyond the requirements of U.S. international trade obligations. The WTO agreement does not affect the Commission's ability to protect the U.S. market against competitive harm and allows continued pre-entry analysis of the potential abuse of foreign market power. Thus, the Commission properly retains the right to deny license applications posing risks to competition that could not be addressed by post-entry safeguards. In addition, the existence of the competitive conditions required by the ECO test, modified to focus on the ability of the applicant to abuse its market power, remain a necessary and permissible part of the Commission's pre-entry analysis.

AT&T has also shown (pp. 20-24) that the Commission's proposed new threshold requirement for a showing of "a very high risk of harm" that could not be addressed by safeguards to warrant denial of a Section 214 or Cable Landing Act license application is not required by the WTO agreement. Similarly, the WTO imposes no

---

[15] For example, current rules prohibit the transfer of C and F block licenses during the

(footnote continued on following page)

requirement for the proposed presumptions in favor of Section 214 and 310(b)(4) approval and accounting rate flexibility.

Predictably, several foreign administrations, foreign carriers and their U.S. affiliates take the opposite view and contend that the Commission has not gone nearly far enough to conform its entry procedures to the requirements of the GATS. According to these foreign commenters, the WTO agreement removes any ability of the Commission to limit market entry, no matter how high the risk of anticompetitive abuse may be. The falsity of these assertions is demonstrated by no lesser authority than the Office of the U.S. Trade Representative ("USTR"), which is the Executive Branch agency primarily responsible for developing and coordinating the implementation of U.S. international trade policy, including the interpretation of U.S. international trade obligations. USTR emphasizes (p. 2) that the Commission's proposals are "consistent with U.S. commitments in the GATS."

USTR underscores (p. 3) that in reviewing license applications the Commission should focus upon the market power of the applicant and should closely examine whether competitive conditions in the foreign country would give the applicant "the ability and the incentive to leverage its market power to distort competition to the detriment of U.S. consumers." USTR thus also confirms, contradicting the claims of many foreign commenters, that the type of pre-entry analysis AT&T has described is fully consistent with the WTO agreement.

---

(footnote continued from previous page)

first five years, except to other qualified entrepreneurs. *See* 47 C.F.R. § 24.839.

USTR's comments resolve any issue in this proceeding concerning the GATS-consistency of the Commission's proposals. As USTR requests (p. 4), the Commission "should continue to show deference to the Executive Branch in matters concerning the interpretation of U.S. international commitments, such as our most-favored-nation obligations."[16] The agency with the statutory mandate to interpret U.S. international trade obligations, that negotiated the WTO agreement on basic telecommunications, and that would defend the Commission's rules against any future WTO challenge must certainly be accorded far greater deference in these matters than the foreign carriers that would be the direct beneficiaries of an over-expansive interpretation of U.S. obligations under the GATS. The U.S. practice has been to make only those changes in domestic law and regulation that are strictly necessary to meet WTO requirements, *see* AT&T at 12-13, and the advice of USTR should be accorded controlling weight in that determination.

Finally, there is still no showing that the proposed presumptions in favor of entry and flexibility and proposed "very high risk" threshold are required under the WTO agreement. As AT&T has described, neutral burdens of proof and the existing "substantial

---

[16] DT wrongly suggests (pp. 3-4) that the WTO agreement binds the Commission in the same way as the Communications Act of 1934. As AT&T describes (p. 14), WTO agreements are not self-executing, apply only to the extent that they are enacted into U.S. law and regulation, do not prevail over U.S. law and provide no basis for any private right of action against the Commission. *See* 19 U.S.C. § 3512. *See also,* 19 U.S.C. § 3533(g) (any agency practice or regulation found to be inconsistent with a WTO agreement in a WTO dispute resolution procedure "may not be amended, rescinded or otherwise modified" without consultation with Congress by USTR and the head of the relevant agency and the submission of a report by USTR to the relevant congressional committee).

risk" standard are equally compatible with GATS and thus should be retained to ensure that the U.S. market does not suffer unnecessary competitive harm.

### 1. USTR Affirms That the Commission May Continue to Examine Whether an Applicant May Leverage Market Power.

USTR's comments are filed on behalf of the statutory inter-agency trade policy organization of the Executive Branch, and specifically address trade policy issues.[17] USTR affirms (pp. 2-3) both that the Commission's proposals are consistent with U.S. commitments under the GATS and that "[t]he United States maintains the right under the GATS to determine whether a proposed service will serve the public interest." Moreover, USTR expressly states (p. 3) that "the impact the proposed service will have on competition in U.S. markets" is "a critical factor in such an analysis." USTR thus upholds the Commission's right under the WTO agreement to deny license applications posing risks to competition that could not be addressed by safeguards.[18] USTR's comments firmly rebut the assertions of several foreign commenters that the Commission's proposals would not meet the "Most Favored Nation" ("MFN") and national treatment requirements of the GATS, and that they would be contrary to other requirements of that agreement.[19]

Noting that "[t]he Commission has long applied such an analysis to U.S. telecommunications companies," USTR states (*id.*) that "we expect the Commission to

---

[17] USTR at 1.

[18] *See also*, USTR at 3 ("additional factors are relevant in determining whether to grant these license applications or foreign ownership waivers") (emphasis added).

[19] *See* DT at 9-11; EU at ¶¶ 5, 8-9; Japan at ¶ 3; KDD at 3-4.

apply such an analysis to foreign entrants."[20] Accordingly, "the Commission should inquire whether the proposed service is likely to help or hinder competition and consumer welfare." *Id.*[21] It further states that "the Commission should evaluate competitive effects, if any, in U.S. telecommunications services markets, in relevant international services markets and on affiliated international routes." *Id.*[22]

As AT&T describes (pp. 19-20), both the Commission and the Department of Justice have found that the prevention of anticompetitive conduct may require the denial of licenses to carriers with foreign market power because of the inadequacy of other safeguards. AT&T has further shown (pp. 16-17), and USTR confirms, that such action would be consistent with GATS requirements. There is therefore no basis to Sprint's claim (p. 8) that the WTO agreement precludes license denial except for all but "truly extraordinary competitive concerns." Nothing in the WTO agreement requires the U.S. to suffer any competitive harm that cannot be addressed by other safeguards.

USTR further affirms (*id.*) that "it is appropriate that the focus of any inquiry should be on determining whether the applicant in question has market power or is affiliated with a carrier that has market power." USTR thus upholds the NPRM's proposal (¶¶ 39-40) to examine applicants' affiliations with carriers controlling bottleneck facilities at the foreign end on international routes. USTR also thus denies DT's contentions (pp. 9-

---

[20] Emphasis added.

[21] Emphasis added.

[22] Emphasis added.

13) that GATS principles preclude any different treatment of carriers with market power.[23] USTR emphasizes that in such cases, "the Executive Branch believes the Commission should examine closely whether the applicant will have the ability and the incentive to leverage its market power to distort competition to the detriment of U.S. consumers." *Id.*

USTR goes on to make clear that the determination of whether the

---

[23] *See also* AT&T at 17; Sprint at 20, n.25 (noting with regard to dominant carrier classification that such treatment "would not depend upon national identity but on market power").

There is also no basis to GTE's claim (p. 10, emphasis omitted) that the control of bottleneck facilities "is not necessarily an accurate indication of future anticompetitive behavior." The Commission reached exactly the opposite conclusion in the *Foreign Carrier Entry Order*, stating that foreign carriers with such control "have the ability and incentive to discriminate against unaffiliated U.S. carriers, thereby harming U.S. consumers and businesses." *Foreign Carrier Entry Order*, 11 FCC Rcd. at 3959. *See also, id.* at 3912 (ECO test applies to "those carriers that have market power that potentially can be leveraged on international routes to the detriment of unaffiliated U.S. carriers.") Similarly, the Department of Justice concluded that through their partial acquisition of Sprint, "FT and DT would [] have increased incentives and the ability, using their monopolies and dominant positions in France and Germany respectively, to favor Sprint and Joint Venture Co. and to disfavor their United States competitors in international telecommunications services in various ways." *U.S. v. Sprint Corp. & Joint Venture Co.*, 60 Fed. Reg. 44058, 44062 (1995) (Competitive Impact Statement) (emphasis added).

However, claims by DT (p. 8, n.5) and FT (p. 26) that non-equity relationships between U.S. and foreign carriers raise similar concerns and merit similar treatment are mistaken. As the Commission has found, non-equity relationships do not provide the same incentives for anticompetitive conduct as "neither carrier derives a direct financial benefit with respect to the other's telecommunications operations." *Foreign Carrier Entry Order*, 11 FCC Rcd. at 3909. Such relationships are therefore much less likely to lead to the discriminatory use of foreign market power against other U.S. carriers. The NPRM (¶ 86) properly concludes that the "no special concessions" requirement, with the application of the basic or supplemental dominant carrier rules where a non-equity relationship with a carrier with foreign market power is found to present a substantial risk of anticompetitive effects, provides adequate assurance in this regard.